

U.S. Department of Labor

Board of Alien Labor Certification Appeals  
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Date Issued: April 26, 20001

Case No.: **2001-INA-00030**  
CO No.: **P2000-NY-02442264**

*In the Matter of:*

**Ditmars Contracting Inc.**  
Employer,

*on behalf of:*

**Jose Narvaez**  
Alien.

Appearance: Vinny Borruto<sup>1</sup>  
c/o Maria Limoncelli  
Unificacion de Servicios al Inmigrante Inc.  
for Employer and Alien

Certifying Officer: Dolores Dehaan  
New York, New York

Before: Vittone, Burke, and Chapman  
Administrative Law Judges

LINDA S. CHAPMAN  
Administrative Law Judge

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<sup>1</sup>The record contains three spellings of this individual's last name, including "Burruto," "Borruto," and "Borro." When his name is referenced in this opinion, the name as it appears on the specific document will be used.

### **Decision and Order Affirming the Denial of Certification**

This case arose from an application for labor certification on behalf of Alien Jose Narvaez ("Alien") filed by Ditmars Contracting Inc. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, New York, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

### **Statement of the Case**

An Application for Alien Employment Certification was received on December 5, 1997, in which the Employer Ditmars Contracting Inc. sought certification for the Alien Jose V. Narvaez for a bricklayer position. The duties for this position were described as follows:

Lay building materials such as brick, structure tile, concrete cinder, etc. to construct or repair walls, partitions and other structures using trowel, brick hammer and mortar. Measure distance to lay out work. Break bricks to fit spaces. Apply plaster to wall.

The application stated no educational or training requirements; however, the application listed a minimum of three years of experience in the position. Recruitment efforts were conducted in conjunction with the New York Department of Labor. One applicant, Paul Horner, had 11 years of experience in "brick, block, and stone laying, as well as finishing flat work" (AF 32). Another applicant, Richard Sale, had been employed as a mason for Granite, Cement and Brick Masons since September 1985 (AF 30). The Alien's resume was also included with the recruitment materials (AF 33). A February 2, 2000, letter from Vinny Borruto to a New York Department of Labor representative states:

In reference to your last letter dated January 26, 2000 three people replied to the Ad. One does not know how to prepare a resume. The second does not have experience. The third one sent his resume, but the only one who is qualify [sic] for the job is Mr. Jose Narvaez.

(AF 38).

This case was referred to the U.S. Department of Labor on April 7, 2000 (AF 43). Certifying Officer (CO) Dehaan issued a Notice of Findings (NOF) on August 7, 2000, in which she stated the Department of Labor's intent to deny the Employer's application for certification. The Employer failed to submit a copy of the posting required by 20 CFR 656.20(g)(1). The Employer also failed to demonstrate a good faith effort to recruit U.S. workers, as there were two applicants for the job with experience exceeding that which was required for the position. The Employer did not indicate whether the applicants were contacted, nor did it demonstrate lawful job-related reasons for rejecting these

applicants. The Employer was given until September 11, 2000, to submit a letter of rebuttal and/or compliance (AF 52-54).

A note to the file dated November 2, 2000, and written by H. Goldstein, states that the Employer's rebuttal was received by September 11, 2000, and consisted of the August 2, 2000, NOF; a Daily News classified advertising statement; three advertisements which ran on February 4, 5, and 6, 2000; and a photocopy of the Posting Notice. Neither an employer letter nor any other documentation were submitted with this rebuttal. Mr. Goldstein stated that "[t]here is no way to determine who submitted the rebuttal but the notice of denial was reviewed by the Agent. . . as he appealed the denial and sent back the original ETA 750 A & B Forms" (AF 55). The Daily News Classified Advertising report shows that the United Service to the Immigrants ran an ad from February 4-6, 2000, the full text of which is difficult to discern on the form (AF 51). A copy of the February 5, 2000, classified ad was also included, and the full text is as follows:

Brick Layer (LIC): Lay building materials such as brick, structure tile, concrete cinder, etc. To construct and repair wall partitions and other structures. 40 hrs/wk. 8am-4pm - \$31.77/hr, OT as needed. Reqs. 3 yrs/exp/ Send resume to MM666, P.O. Box 703, New York, NY 10014-0703

(AF 49). However, another posting submitted states that the bricklayer must have "5 years experience in lay[ing] building structure tile, construct[ing] or repair[ing] walls, [and] apply[ing] plaster to walls and ceilings for 5 days a week" (AF 47).

On August 28, 2000, before the deadline for submission of rebuttal, the CO issued a Final Determination (FD) denying certification on two grounds, the first being that "[t]he posting submitted in rebuttal to the Notice of Findings is still unacceptable because it was not posted in accordance with the regulatory requirements." Secondly, the Employer's rebuttal failed to address the determination in the NOF that two qualified applicants existed and that no job-related reasons had been given to reject those applicants (AF 56-57). In a letter dated September 8, 2000, and received September 15, 2000, Mr. Burro requested that the CO reconsider this matter and "accept the Notice that [he] had prepared" (AF 65). This "Notice" stated that an opening for a bricklayer existed, and described the duties for the position, but did not list the required years of experience (AF 58).

This matter was subsequently referred to the Board of Alien Labor Certification Appeals (Board). Thereafter, a Notice of Docketing and Order Requiring Statement of Position or Legal Brief was issued on December 7, 2000.

### **Conclusions of Law**

The record is less than clear with regard to the date on which the rebuttal documents were received, and it appears that the FD may have been issued before the deadline for submission of

rebuttal by the Employer.<sup>2</sup> In any case, this information was definitely considered, as evidenced by the November 2, 2000, note to the file. Moreover, nothing in the rebuttal information provided addresses the NOF requirements that the Employer show that good faith efforts to recruit U.S. workers were made, as there were two applicants for the job with experience exceeding that which was required for the position, and the Employer did not indicate that it contacted the applicants and/or had lawful job-related reasons for rejecting these applicants.

If applicants for the position clearly meet the minimum qualifications for job, they are considered qualified. *UPS*, 1990-INA-90 (Mar. 28, 1991). Generally, it is unlawful for an employer to reject workers who meet minimum education and experience requirements. *American Cafe*, 1990-INA-26 (Jan 23, 1991). Labor certification is properly denied when an employer rejects U.S. worker who meet minimal requirements. *Sterik Co.*, 1993-INA-252 (Apr. 19, 1994). *Luis A. Morillo*, 1994-INA-223 (July 26, 1995).

The only reference to the evaluation of the U.S. worker applicants is contained in the February 2000 letter from Mr. Borruto, which states:

In reference to your last letter dated January 26, 2000 three people replied to the Ad. One does not know how to prepare a resume. The second does not have experience. The third one sent his resume, but the only one who is qualify [sic] for the job is Mr. Jose Narvaez.

(AF 38). This statement does not specify which applicants were considered. Materials for two applicants are a part of the record. According to his resume, one applicant, Paul Horner, worked for nearly four years as a mason for R.K. Masonry, and had been employed for approximately five years as a mason at Bob Westerman Masonry. He also had a year of experience as a laborer at Pete Paulus Construction, which could have been relevant experience (AF 31-32). The record contains no evidence that this applicant was contacted regarding this position, and his resume, on its face, states far more than the minimum three years of experience required for the bricklayer position advertised by the Employer. According to the resume of Richard Sale, the second applicant, Mr. Sale had been employed as a mason for Granite Cement and Brick Masons from September 1985 forward, which at the time would have constituted approximately 15 years of experience (AF 30). His duties as they were described appear to meet the requirements of the position as advertised, and he, too, had far more than the minimum years of experience required for the position. There is no evidence that this applicant was ever contacted by the Employer to set up an interview. I note also that at no time was the ability to write a resume made a requirement for the bricklayer position. At least on the face of their resumes, both of these applicants had experience far greater than that which was required for the position. While the Employer's letter suggests that there were three applicants for the position, only

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<sup>2</sup>However, I note that the FD makes reference to the rebuttal documents, suggesting that they were received prior to issuance of the FD.

two resumes other than that of the Alien were made part of the record. The fact remains, however, that the Employer bears the burden of establishing that the applicants were contacted and that lawful job-related reasons existed for rejecting their applications. The Employer failed to meet this burden; therefore, the CO properly denied labor certification.

**ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

\_\_\_\_\_  
Linda S. Chapman  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

